

ROGER A. BROWN

Phone (209) 533-7755

Lawyer
38 North Washington Street
Post Office Box 475
Sonora, California 95370

RECEIVED
FAIR POLITICAL
PRACTICES COMMISSION

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Fax (209) 533-7757

March 28, 2002

Mark Krausse, Executive Director
Fair Political Practices Commission
P.O. Box 807
Sacramento, CA 95812-0807

RE: Opinion Request Government Code § 83114

Dear Mr. Krausse:

I have been retained by Colin J. Coffey of the Archer-Norris law firm to assist them in representing the Peninsula Health Care District ("District"). The District has asked us to request a formal opinion from the Fair Political Practices Commission concerning the application of the Political Reform Act (as amended) to the proposed actions of one of its governing board, Terilyn Hanko.

Your opinion is of vital importance to the District and to Director Hanko. Most of the business of the District involves decisions impacting its relationship with Mills Peninsula Health System ("MPHS"), a wholly owned subsidiary of Sutter Health, both of which are California non-profit public benefit corporations. MPHS operates the District's hospital, Peninsula Hospital, under a 30 year lease. Recent events and legislation require the District to replace the hospital with a new facility by the year 2013. Accordingly, most of the important decisions facing the District involve the hospital and the District's relationship with MPHS. However, FPPC staff has advised Director Hanko to disqualify herself from decisions affecting MPHS (thus nearly all decisions she was elected to decide) because they deemed MPHS to be a "source of income" to her, although MPHS was not the actual payor of any income to her, nor did MPHS have any control over the fact or amount of any payments, nor did Director Hanko have any legal or contractual right to receive the payments at issue.

The basic question is whether Director Hanko must be deemed to have received discretionary "bonus" income from persons or entities other than the actual payor (her employer) where: a) the income is not a commission within the meaning of Regulation 18703(c); b) there is no right to the bonus; and, c) these "other" persons or entities have no control over whether or how much of a bonus she might receive. Your staff has concluded that Director Hanko must look beyond the actual payor to one of its customers, MPHS, as the ultimate source of income. We disagree.

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In very simple terms, we contend that under the facts presented, the only relevant statute (Gov. Code §87103) and regulation (Reg. 18703.3)¹ compel the conclusion that only the actual payor may be deemed a source of income to Director Hanko. Section 87103 states that a public official has a financial interest in a "source of income." Unless the term, "source of income," is qualified by statute or regulation, the actual payor is the source. Regulation 18703.3(a) states that a public official has an economic interest in "*any person from whom he/she has received income* aggregating two hundred fifty dollars (\$250)...." (Emphasis added.) On its face, subsection (a) of the regulation also makes the actual payor the "source of income." The only exception in the regulations is for sources of "commission income" which are attributable to specific sales. Staff agrees that this exception does not apply to Director Hanko's situation. As a result, the only statute and the only regulation on point both indicate that the actual payor is the "source of income."

The facts are set out in the request for advice from District Counsel, Colin Coffey, dated March 15, 2001 (copy enclosed and made a part hereof by reference). The staff advice, under Advice Letter No. A-01-064 is enclosed and incorporated herein by reference. We requested reconsideration of the staff advice by letter dated November 20, 2001, and we have also attached and incorporated by reference that letter and the staff response of January 15, 2002. Our review of the initial staff advice, the reply to our request for reconsideration and the logic and authority for the staff advice convinces us that the staff is in error and accordingly, we ask the Commission to consider the matter and to issue a formal Commission Opinion on the subject.

We have analyzed the prior staff advice letters upon which the current staff relies and incorporated that analysis in our request for reconsideration (enclosed). Prior staff advice was that if someone other than the actual payor controlled the fact or amount of the payment and if the official had a right to receive the payment, then the payment was "akin" to or "analogous" to a commission and for that reason the person or entity "controlling" the payments should be considered a "source of income" along with the actual payor. We contend the analysis should start and end with the statute and regulation, both of which indicate the actual payor is the "source of income." Being "akin" to or "analogous" to a commission is not enough to make MPHS a "source of income" under a "commission income" regulation which clearly excludes these payments.

We believe the staff has misapplied the prior advice letters. That is because Director Hanko has *no right* to receive the bonus income and because MPHS has absolutely *no control* over the fact or amount of the bonus. Under these circumstances the reasons for the prior advice letters' conclusions are absent and their rationale cannot result in MPHS being a "source of income" to Director Hanko. We invite your attention to our request for reconsideration for further development of these contentions.

¹ Hereafter, all statutory references are to the Government Code and all references to Regulations are to the California Code of Regulations.

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A formal opinion is appropriate in this case for a number of reasons.²

- On its face, the statute (Gov. Code § Section 87103(c)), includes only the actual payor as the source of income.
- The only regulation which makes an exception to the “actual payor” as a source of income for conflict of interest purposes (Regulation 18703.3(c)), created a very narrow exception for “commission income” which does not apply here. On the other hand, Regulation 18703(a) includes only the actual payor as the “source of income.”
- The discretionary bonus income which Director Hanko may receive, is not “commission income” because it is not within the definition of these terms in Regulation 18703.3(c)(2) which states, “Commission income” means gross payments received as a result of services rendered as a broker, agent, or other salesperson *for a specific sale or similar transaction*. Commission income is received when it is paid or credited.” The discretionary bonus income which Director Hanko may receive is *not* generated as a result of a “specific sale or similar transaction.”
- We have sought and received staff advice, but we believe that advice is erroneous and we have no other remedy but to seek a formal opinion to clarify and formalize the Commission’s interpretation of the “source of income” under these circumstances.
- This request raises a substantial question of interpretation and calls into question several prior inconsistent advice letters which should be reviewed by the full Commission,
- The questions are not hypothetical and they are raised by authorized representatives of the person whose conduct is at issue.
- The question is specific to the facts and circumstances concerning Director Hanko’s ability to participate in crucial decisions affecting the Hospital District.

While the staff reply to our request for reconsideration seemed to reiterate its reliance upon past advice letters, we do not believe that prior advice was applied properly. Since control and the right to receive the payment were the essential analytical support for the prior advice, the absence of those elements here should have led to a different result. The statute and the regulation indicate the actual payor is the “source of income,” and since no recognized exception to that rule applies here, there is no good reason to disqualify Director Hanko from participating in the most important issues facing the District during her term of office.

We believe that a public official should not be “lightly” disqualified from making and participating in decisions which the voters elected her to make. That is especially true where the statute and the only relevant regulation indicate she should be able to participate fully. Because the staff advice in this

² See Regulation 18320(f) specifying criteria to be considered by Executive Director in determining whether to grant opinion request.

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matter is problematic in the opinion of the District; the District believes it needs more definitive direction from the Commission. Otherwise, the District believes it will remain in a significant state of legal uncertainty regarding the proceedings of its governing board on this important subject. We believe the staff has not given sufficient weight to the statute and the regulation and that they have misapplied prior staff advice in reaching their conclusions. Accordingly, we ask the full Commission to consider this matter and to issue a formal opinion clarifying the Commission's interpretation of the statute and its regulation.

Your consideration of our request is greatly appreciated and we look forward to providing you whatever additional information you may require to facilitate the process and your deliberations.

Very truly yours,



Roger A. Brown

RAB/lis
Enclosures

cc: Colin Coffey, Archer-Norris